IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 478 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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SABARKANTHA DISTRICT MILK UNIOON LIMITED THRO' SR.MANAGER - Applicant(s)

Versus

STATE OF GUJARAT & 3 - Respondent(s)

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Appearance :

MR HIMANSHU K PATEL for Petitioner No(s).: 1.

MR NC SOOD, LD.APP for Respondent No(s).: 1.
MR ATUL G BAROT for Respondent No(s).: 2, 3,4.
MR NIKHILESH J SHAH for Respondent No(s).: 2, 3,4.
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CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date : 18/07/2005

ORAL JUDGMENT

1. The present Revision Application is filed by the orig.complainant of the FIR lodged with the Himatnagar Town Police Station vide C.R. No.I-150

of 2000 against the respondent nos.2 to 4 for the offences punishable under Sections 407 and 114 of the Indian Penal Code. After investigation the police chargesheeted all the three accused persons namely driver, cleaner and owner of oil tanker. The accused faced trial of Criminal Case No.1167 of 2000 but at the conclusion of the trial, the ld.JMFC, Himatnagar, acquitted the accused from all the charges levelled against them. The orig.complainant being aggrieved by the order of acquittal has assailed the order of acquittal by way of present Revision Application. Of course, the State of Gujarat has not preferred any appeal. So the present Revision Application requires to be dealt with as Revision Application filed by a private party in a case instituted on a police report.

2. The facts which were placed by the prosecution before the trial Court reveals that one Balrajkumar Babulal Rana serving with Sabarkantha District Milk Producers' Union Ltd. (hereinafter referred to as 'the Union') filed the complaint in question and it is alleged that the accused no.3 was given contract to supply furnace oil and,

therefore, in one motor tanker the furnace oil was lifted from IOC Vadodara Depot and the same was to be given to the complainant as Contractor of the Union. The accused no.3 is a regular contractor and transporting the furnace oil from various depots mainly the depot at Vadodara of IOC. But as per the say of the prosecution, about 400 to 500 litres of furnace oil was taken out and water was added in the said tanker and when this fact came to the knowledge of the complainant, he lodged a complaint. Mainly after the complaint, the motor tanker involved in the crime was seized and the sample was taken and, thereafter, investigation was carried out and it was found that there was some strength in the say of the complainant and, therefore, the accused persons were chargesheeted. During trial, the prosecution led oral as well as documentary evidence and examined as many as 11 witnesses and tendered 7 documents in support of the oral version of the witnesses examined. But thereafter in the background of the explanation given by the accused persons under Section 313 of the Code of Criminal Procedure, 1973, the ld.JMFC vide order under challenge dated 12th February, 2002, acquitted the accused of all the charges

levelled against them in respect of the crime in question. According to the petitioner, the order of acquittal is erroneous and it is failure to appreciate evidence produced during trial. It is apparently clear from the evidence that all the accused have abetted each other in committing the crime in question and in taking out 400 to 500 litres of furnace oil and this amounts to causing a wrongful loss to the Union. It is submitted that though there is clear evidence of adulteration in the furnace oil by adding water, the learned Judge has thrown out the entire story of the prosecution and the accused persons are given advantage of gross error committed by the ld.APP of not producing the Forensic Science Laboratory (FSL) report. The learned Judge has not believed the fact of adulteration in oil by adding water only for want of FSL report though the same was readily available on record, it was not considered by the learned Judge merely because the same was not legally tendered and proved while leading evidence. When there is clear evidence to show that the accused nos.1 and 2 were the persons who had brought the Tanker bearing Registration No.GRU-3924 in the Union premises and

undisputedly, the sample taken out from the said tanker is found adulterated. There was no scope to raise any doubt against the guilt and in view of the status of all the three accused persons, all of them, according to the complainant, must have been held guilty for the offence punishable under Section 407 and 114 of the Indian Penal Code.

3. From the set of papers, Mr.S.V.Raju, learned counsel appearing for the petitioner-orig.complainant, has taken me through the entire piece of oral as well as documentary evidence and he has also attempted to show the finding recoded by the FSL in the report of analysis of the oil sample sent by Investigating Agency and other aspects and tried to demonstrate that the finding of the learned Judge is absolutely illogical and erroneous and based on the aspects which are contrary to the facts stated by the witnesses examined by the prosecution.

4. Alternatively Mr.Raju has argued that this Court when is not able to convert, in view of settled legal position, the acquittal into a conviction and sentence, then the matter may be remanded back with appropriate direction to the ld.Chief

Judicial Magistrate, Himatnagar, to permit the prosecution to prove the FSL report by its formal tendering in evidence and he may be directed to reappreciate the oral evidence in the background of the finding recorded by the FSL. The Courts may be permitted to reexamine any of the witnesses and accused persons can explain any incriminating part of the evidence. For short, according to Mr.Raju, the Revision Application should be allowed and the order of acquittal should be quashed and set aside.

In support of oral submissions, Mr.Raju has cited two decisions. The first decision cited by Mr.Raju is reported in 1998(9) SCC 331, in the case of V. Srinivasa Reddi v. State of Andhra Pradesh. In this cited decision, the trial Court after considering the oral as well as documentary evidence had recorded that the prosecution has failed to establish any offence against the accused and, therefore, they should be acquitted in respect of crime in question. The High Court in an appeal by the State of Andhra Pradesh allowed the said appeal and remanded the matter back to the trial Court for disposal in accordance with law. The High Court found that the trial Court had

overlooked reports submitted by the auditor for the year 1984-85. The Apex Court found that the ld.trial Judge had appreciated the evidence of witnesses examined by the prosecution in a most profoundry manner and had overlooked various other circumstances which were relied upon by the prosecution and held that the order of remanding the case to the ld.trial Judge for the purpose is good and dismissed the appeal of the appellant-accused. So in the present case also, according to MR.Raju, the trial Court should be asked to appreciate the F.S.L. Report and the oral evidence of the witnesses examined in the background of the report of analysis. The second decision is in the case of ***Jagannath Choudhary and ors. v. Ramayan Singh and anr., reported in 2002(3) GLR (SC) 2743***. In the cited decision, the Apex Court has observed that the main question which is required to be considered is as to whether substantial justice has been done or not. The revisional jurisdiction is to be exercised only in an exceptional situation when there is fragrant miscarriage of justice on account of manifest illegality or glaring defect in procedural aspects. In paragraph :10 of the said decision, the Apex Court has

observed that ***"it is true and now well-settled in long catena of cases that exercise of power under Section 401 cannot but be ascribed to be discretionary- this discretion, however, as is popularly informed has to be a judicious exercise of discretion and not arbitrary one. Judicial discretion cannot but be a discretion which stands "informed by tradition, methodised by analogy and disciplined by system" - resultantly only in the event of a glaring defect in the procedural aspect or there being a manifest error on a point of law, and thus, a fragrant miscarriage of justice, exercise of rivisional jurisdiction under this statute ought not to be called for"."*** In the present case, according to Mr.Raju, serious allegations were made against the public prosecutor who conducted trial; because of his failure in producing the FSL report though the same was available with the prosecutor and the Court, and when it is open for the High Court in revision to set aside an order of acquittal even at the instance of private party, though State may not have thought it fit to prefer appeal, this Court should exercise its revisional jurisdiction saying that the present case is an exceptional one

and there is a glaring defect in procedure and a manifest error in appreciating the oral as well as documentary evidence. The question of overlooking arises only when there is a possibility of looking at the evidence i.e. legal and material evidence. The words 'material evidence' refers to a piece of evidence available on record and not otherwise. The FSL report, of course, was not part of material evidence on record, so it cannot be said that the ld.trial Judge has overlooked that part of evidence. But this Court, according to Mr.Raju, can remand the matter permitting the prosecutor to lead additional evidence and to tender the FSL report in evidence.

5. The say of ld.Public Prosecutor appearing in the matter is that the State has accepted the order of acquittal especially in view of certain directions in the oral version of the witness examined by the prosecution and some admissions made by the important prosecution witnesses as to on the point of drawing of sample from the tanker in question and other background that the accused persons are regularly bread from the very Union. There is allegation of some political vendetta against the

complainant and the witnesses examined and the method of selecting the Panchas while drawing the sample may not have tempted the Government to prefer appeal against the order of acquittal.

6. Mr.Nikhilesh Shah, learned counsel appearing for the original accused persons has seriously assailed the arguments advanced by Mr.Raju and it is submitted that the order of acquittal recorded by the ld.trial Court is absolutely legal and the same is passed on sound principle of appreciation of evidence. While developing the argument Mr.Nikhilesh Shah at one point of time also submitted that for the sake of argument even this Court decides to consider the FSL report as an incriminating piece of evidence against the accused, even then the shadow of doubt remains as it is, which is discussed at length by the ld.trial Judge and the acquittal in such a fact situation is not required to be disturbed and in support of this argument, Mr.Nikhilesh Shah has taken this Court through the discussion of oral as well as documentary evidence made by the ld.trial Judge and certain clear admissions made by the prosecution witnesses on procedure adopted while

drawing the sample and examining it or analysing it. Other conflicting evidence in this regard is also pointed out. I have carefully gone through the order of acquittal recorded by the ld.trial Judge in advance to the arguments advanced by the learned counsel appearing for the parties.

7. Undisputedly, the Panchas while drawing sample from the Tanker in question of furnace oil are not independent persons and both the panchas selected by the Investigating Agency were at relevant point of time i.e. at the time of drawing sample as well as at the time of examination as witnesses during trial were in service of the very Union. This milk Union itself is maintaining a laboratory and the same is having equipment to test the adulteration and it is not the case that on earlier occasion such tests were carried out and any of the accused and especially the accused no.3 who is the contractor-supplier was warned in writing by the Union as to the quality of furnace oil brought by him to the storage site. It is in evidence that the respondent-accused are regular contractors since years. So the allegation of taking out about 400 to 500 litres of furnace oil from one tanker

is found less probable and in the background of this absence of probability, the evidence led by the prosecution was required to be appreciated and it is rightly appreciated. It is specifically alleged by the defence side showing certain documents that the complaint is filed with a motive to get the contract of respondent no.3 cancelled and the motive is not only of monetary gain but also to get political advantage. It is pointed out that the internal politics of a well settled cooperative union plays material role in such type of contracts, etc. and according to Mr.Nikhilesh Shah, the respondents-accused were victimised by persons concerned with the administration at the relevant point of time. Otherwise, they would have called independent witnesses as panch witnesses. While taking out sample for the first time, the same can be tested in the union laboratory, the accused persons especially any of of the accused would have been informed in advance. It is true that as per the case of the prosecution in both the analysis, one carried out by union itself in its laboratory and FSL report, water was found is the case of prosecution and there is no inconsistency in this

allegation. But there is no evidence that the percentage allegedly found is recorded by adopting convincing and scientific method and therefore, such a finding would not by itself be sufficient to link the accused with the crime because such report/analysis are nothing but opinion evidence. I am attracted with the arguments advanced by Mr.Nikhilesh Shah that as per the accepted principles of physics, if any person inserts water, that too about 400 to 500 litres in a tanker having furnace oil, the same would get stable at the bottom of the tanker and very meager portion of moisture would remain on the top of the tanker, if the tanker is kept at one place and there is chance of stabilisation of the liquid inside the tanker and the accused no.3 was regular transporter since 1994. The alleged incident occurred during the contract year 1999-2000 and as per the system developed with the contractor, the transporter was paying the amount of consideration of oil of Rs.50,000/- by demand draft and on receipt of the furnace oil, the transporter was paid and on some occasions this amount was paid by the Union through draft and such drafts were being handed over to the contractor so that he can get

the delivery of furnace oil from the depot of I.O.C. One important witness i.e. PW-1 shown ignorance of the fact that on some occasions, the contractor was also paying the amount of oil to I.O.C. It is in evidence that a witness having technical knowhow being a Mechanical Engineer has accepted in the cross-examination that on each occasion before taking delivery of furnace oil, the Union was testing the sample brought by the contractor and, thereafter only, he was paid his legitimate dues and has admitted that this Union was testing the sample in its laboratory. This witness has accepted that the test is carried out by the laboratory and has said that to test the presence of water in the furnace oil deep-stick method is not adopted. As per the deep-stick method a chemical is being applied on a stick and that stick is being inserted in the oil tanker from the top and if water is there at any layer of the liquid in tanker, then colour of the chemical of that part of deep-stick would be changed. In the present case, there is evidence that it was possible to trace out the presence of water adopting the deep-stick method. Of course, PW-1 denied that by applying chemical on deep-stick the

samples are being tested by the Union i.e. by adopting deep-stick method. In the present case, if 400 or 500 litres of water is added in the tanker of furnace oil in question on 28nd April, 2000 as alleged, then looking to the size and shape of the water tanker, there must be a specific and clear layer of water at the bottom of the tanker and there is no evidence to show that this method was either adopted by the Union laboratory technician or by the FSL expert. It is not a matter of dispute that the samples are being drawn form the tanker for analysis after certain hours of arrival of the oil tanker, so that the liquid in the tanker can get stabilised and the sample can be drawn scientifically to get the correct result at the end of analysis. In the present case also, the motor tanker was very well available for hours and thereafter, the sample was drawn. Whether these samples were taken in a plastic container or a glass bottle, whether they were signed and sealed by the Panchas when the same were drawn or any subsequent point of time, etc., is an independent side of evidence but the fact remains that it was possible for the experts to draw the sample from different portions i.e.

from the bottom by opening valve; also from the top i.e. head of the tube of the tanker and that this probably would get about 90% to 95% amount from the sample drawn from the bottom because of stabilization of about 400 to 500 litres of water in tanker carrying liquid about 9000 to 10000 litres. In the same way, the percentage of water would remain practically similar when the oil is taken out from the middle portion of the stabled liquid i.e. furnace oil and/or from the top level of the furnace oil and it is not the case of the prosecution witness that the finding recorded by the laboratory experts of Union and the FSL, are just similar and, therefore only, the Public Prosecutor has negligently or with some ulterior motive not tendered the FSL report in evidence. The record clearly shows that the FSL report was sent directly to the Court and a copy was made available to the Public Prosecutor. It seems that nobody has cared to ascertain as to where the original report was. It will be difficult for this Court to accept the say of Mr.Raju, learned counsel appearing for the orig.complainant, that the Public Prosecutor deliberately suppressed the FSL report though the same was made available to

him. On the contrary, the trial Court's record clearly reveals that the same was available to the Court. It is highly probable that because of the material conflict in the findings; i.e. one recorded by the laboratory of Union and the FSL, the Public Prosecutor might have decided not to tender the second report. So the accused may not get advantage of the situation and the method of drawing sample also may not be assailed seriously by the defence side. Without prejudice to the rights and contentions, Mr.Nikhilesh Shah, learned counsel appearing for the respondents-accused has submitted that to reach to a logical and legal finding and to do substantive justice, this Court may look to the findings recorded by the FSL and he has pointed out that total four samples were sent to the FSL and all were in plastic bottles. Normally the plastic bottle is not capable of applying sealing-wax because it would melt if it is brought near heat or fire. There is controversy as to the type of bottle selected while sealing all the four samples. When it is the case of the prosecution that four different bottles were drawn from different levels of a parked motor tanker in question, the percentage of

water as recorded by the FLS would not come. In sample 'A', the percentage of water would be much higher than 15% to 20% as recorded by the FSL and the difference between the percentage of water found in sample 'B' and 'C' is contrary to the well accepted principles of physics because even some percentage of water remains with the furnace oil, then it would start getting reduced when the oil layers are seen or tested from the bottom to top side. Here in the present case, the sample 'B' shows water level at 29.95% and water level in sample 'C' was 35.5.%. If we visualize a cubical picture of the tanker, then the fourth i.e. the top level, would not be that less as 2.6% recorded by the FSL. In reality, the sample 'C' is found having 35.5% of water. The said conclusion is emerging from the result '3' recorded by the FSL. So it is doubtful in this background that the samples sealed and sent to FSL are genuine withdrawals of liquid from the stable tanker of furnace oil or not. It is rightly submitted by Mr.Barot that practically first two samples would be showing much higher percentage of water than alleged by the prosecution. So the Court is not in agreement with the arguments advanced by Mr.Raju

for the petitioner.

8. In view of above facts and circumstances of the case, the Court cannot ignore that at one place the prosecution witnesses says that their personal laboratory i.e.Union, is equipped laboratory and at another place, they have admitted that they have no sufficient scientific equipment to test the percentage of mixture of water or any other liquid in the furnace oil. This conflict of evidence makes this Court to believe that some wrong has been committed by the prosecution witnesses and there is ample probability of lodging criminal complaint with ulterior motive. Undisputedly, the contract of the respondents-accused has been cancelled and there is a litigation pending on account of non-payment of even deposit amount. Of course, this Court is not supposed to consider these extraneous aspects but when the defence is based on a probability and there are important lacunas in the case of the prosecution, the case normally should not be remanded back to the trial Court, as it will have an effect of practically retrial or fresh trial.

9. In view of above facts and circumstances of the

case, I would like to quote the relevant observations made by the Apex Court in the case of ***Jagannath Choudhary and ors. v. Ramayan Singh and anr., reported in 2002(3) GLR (SC) 2743*** by referring to the earlier decision in the case of ***K. Chinnaswamy Reddi v. State of A.P., reported in AIR 1962 SC 1788***, which are as under :

> "8. *More than four decades ago, this Court in K. Chinnaswamy Reddy v. State of Andhra Pradesh & Anr., AIR 1962 SC 1788 very succinctly formulated the extent of jurisdiction by the revisional Court upon reliance on two oft-cited decisions of this Court as mentioned therein in the manner following :*
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> *"(4). The extent of the jurisdiction of the High Court in the matter of interfering in revision against an order of acquittal has been considered by this Court on a number occasions. In D.Stephens v. Nosibolla, 1851 SCR 284 : AIR 1951 SC 196, this Court observed :*

"The revisional jurisdiction conferred on the High Court under Sec.439 of the Code of Criminal Procedure is not to be lightly exercised when it is invoked by a private complainant against an order of acquittal, against which the Government has a right of appeal under Sec.471. It could be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality or the prevention of a gross miscarriage of justice. This jurisdiction is not ordinarily invoked or used merely because the lower Court has taken a wrong view of the law or misapproprited the evidence on record."

(5) Again in Logendranath Jha v. Shri Polailal Biswas, 1951 SCR 676 : AIR 1951 SC 316, this Court observed :

"Though sub-sec.(1) of Sec.439 of the Criminal Procedure Code authorises

the High Court to exercise in its discretion any of the powers conferred on a Court of Appeal by Sec.423, yet sub-sec.(4) specifically excludes the power to 'convert a finding of acquittal into one of conviction'. This does not mean that in dealing with a revision petition by a private party against an order of acquittal, the High Court can in the absence of any error on a point of law reappraise the evidence and reverse the findings of facts on which the acquittal was based, provided only it stops short of finding the accuse guilty and passing sentence on him by ordering a re-trial."

(6) These two cases clearly lay down the limits of the High Court's jurisdiction to interfere with an order of acquittal in revision : in particular, Logendranath Jha's case, 1951 SCR 676 : AIR 1951 SC 316, stresses that it is not open to a High Court to convert a finding of

acquittal into one of conviction in view of the provisions of Sec.439(4) and that the High Court cannot do this even indirectly by ordering retrial. What had happened in that case was that the High Court reversed pure findings of facts based on the trial Court's appreciation of evidence, but formally complied with sub-section (4) by directing only a retrial of the appellants without convicting them, and warned that the Court retrying the case should not be influenced by any expression of opinion contained in the judgment of the High Court. In that connection, this Court observed that there could be little doubt that the dice was loaded against the appellants of that case, and it might prove difficult for any subordinate judicial officer dealing with the case to put aside altogether the strong views expressed in the judgment as to the credibility of the prosecution witnesses and the circumstances of the case in general.

(7) It is true that it is open to a High

Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. Sub-sec.(4) of Sec.439 forbids a High Court from converting a finding of acquittal into one of conviction and that makes it all the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of conviction. This places limitations on the power of the High Court to set aside a finding of acquittal in revision and it is only in exceptional cases that this power should be exercised. It is not possible to lay down the criteria for determining such

exceptional cases which would cover all contingencies. We may, however, indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision. These cases may be : where the trial Court has no jurisdiction to try the case, but has still acquitted the accused or where the trial Court has wrongly shut out evidence which the prosecution wished to produce or where the appeal Court has wrongly held evidence which was admitted by the trial Court to be inadmissible or where material evidence has been overlooked either by the trial Court or by the appeal Court or where the acquittal is based on a compounding of the offence, which is invalid under the law. These and other cases of similar nature can properly be held to be cases of exceptional nature, where the High Court can justifiably interfere with an order of acquittal; and in such a case, it is obvious that it cannot be said that the High Court was doing indirectly what it could not do directly in view of the

provisions of Sec.439(4). We have therefore to see whether the order of the High Court setting aside the order of acquittal in this case can be upheld on these principles.""

10. So according to me, when the Court is thinking of ordering retrial or to permit the party to lead evidence allowing the Revision Application against the order of acquittal filed by a private party, then it should not enter into appreciation of evidence available on record but it is equally true that the strength in the evidence which is proposed be led and the permission being sought should be tested. In the present case, the Court found that even formal production or admission of FSL report would not affect the ultimate finding of acquittal recorded; when the samples are prima facie found doubtful; when the selection of panchas is not objective or independent; when the sealing procedure and methodology adopted for drawing sample and sealing the same is under clouds and there is conflicting evidence, having certain material omissions on the part of the prosecution witnesses examined including PW-1 and

other important witnesses, it is of no use remanding the matter for the sake of remanding it. Merely because one opinion evidence though was available was not legally tendered in evidence by the Public Prosecutor, it will be difficult for this Court to accept the say of Mr.Raju that non-production is deliberately and with ulterior motive. It is very likely that this action may be at the instance of the prosecution and to avoid criticism of finding recorded by the Union Laboratory and the FSL analyst.

11. The State has not preferred any appeal against the order of acquittal as submitted by ld. APP Mr.N.C. Sood. Therefore, this is a Criminal Revision Application by a private person and there is a limited scope for exercise of revisional jurisdiction by this Court in view of the decision of the Apex Court in the case ***Shingara Singh v/s State of Haryana & Another, reported in 2005 SCC (Cri.) P.870.*** It would be beneficial to refer relevant paras 26 of the said decision wherein the Apex Court has held that it is well settled that in an appeal against the acquittal, the High Court is entitled to reappreciate the entire evidence on

record, but having done so, if it finds that the view taken by the trial Court is a possible reasonable view of the evidence on record, it will not substitute its opinion for that of the trial Court. Only in cases where the High Court finds that the findings recorded by the trial Court are unreasonable or perverse or that the Court has committed a serious error of law, or where the trial Court had recorded its findings in ignorance of relevant material on record or by taking into consideration evidence which is not admissible, the High Court may be justified in reversing the order of acquittal. It is further observed that "in any event, in a case of acquittal if the view of the trial court is a possible reasonable view of the evidence on record, interference by the High Court may not be justified. In para-2 of the decision, the Apex Court has observed that **"in any event a criminal revision preferred by a private party against an order of acquittal could not result in the conviction of the accused."**

In the case of ***Vimal Singh V/s Khuman Singh And Another, 1998 SCC (Cri.)1574,*** while dealing with the powers of the High Court under

Sec.401 of CrPC, the Apex Court has observed in para:9 as under:-

> ***"9**. Coming to the ambit of power of the High Court under Section 401 of the Code, the High court, in its revisional power does not ordinarily interfere with judgments of acquittal passed by the trial court unless there has been manifest error of law or procedure. The interference with the order of acquittal passed by the trial court is limited only to exceptional cases when it is found that the order under revision suffers from glaring illegality or has caused miscarriage of justice or when it is found that the trial court has no jurisdiction to try the case or where the trial Court has illegally shut out the evidence which otherwise ought to have been considered or where the material evidence which clinches the issue has been overlooked. These are the instances where the High Court would be justified in interfering with the order of acquittal. Sub-section (3) of Section 401 mandates that the High Court shall not convert a*

finding of acquittal into one of conviction. Thus, the High court would not be justified in substituting an order of acquittal into one of conviction even if it is convinced that the accused deserves conviction. No doubt, the High Court in exercise of its revisional power can set aside an order of acquittal if it comes within the ambit of exceptional cases enumerated above, but it can not convert an order of acquittal into an order of conviction. The only course left to the High court in such exceptional cases is to order retrial. In fact, sub-section (3) of Section 401 of the Code forbids the High Court in converting the order of acquittal into one of conviction. In view of the limitation on the revisional power of the High court, the High Court in the present case committed manifest illegality in convicting the appellant under Section 304 Part:I and sentencing him to seven years' rigorous imprisonment after setting aside the order of acquittal."

12. The reasons recorded by the ld. Trial Judge are

logical and there is no element of perversity or patent illegality. The Apex Court in a decision in the case of ***Dwarkadas v. State of Hariyana reported in (2002)1 SCC 204,*** has reiterated the accepted principles of law where it has been held that the judgment and order of acquittal normally should not be reversed merely because the other view is also possible. In the same way, the observations of the Apex Court in the case of ***Kanshiram v. State of Madhya Pradesh (Re: Para-21), AIR 2001 SC 2902*** in respect of appeal against the order of acquittal, positively would help the accused. As per the settled legal position, while appreciating the order of acquittal, the Court should go slow in reversing the order of acquittal unless the order is absolutely illegal and perverse.

13. In view of above observations and decisions cited, it appears that there is no merit in this Revision Application and hence, the same is hereby dismissed. Rule is discharged.

(C.K. Buch, J)

Aakar